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MEMORANDUM

To: Lynnwood City Council
Lynnwood Planning Commission

CC: Mayor Don Gough
✓ David Osaki, Community Development

From: John E. Galt, Hearing Examiner 

Date: January 11, 2010

Subject: Annual Report for 2009

The Lynnwood Municipal Code provides for an annual report from the Hearing Examiner to the City Council and Planning Commission:

The Examiner shall report in writing to and meet with the Planning Commission and City Council at least annually for the purpose of reviewing the administration of the land use policies and regulatory ordinances, and any amendments to City ordinances or other policies or procedures which would improve the performance of the Examiner process. Such report shall include a summary of the Examiner's decisions since the last report.

[LMC 2.22.170] This Report covers the cases which I decided during 2009. The report is divided into two parts: Hearing Activity and Discussion of Issues. I am available to meet at a time of mutual convenience with Council and/or Planning Commission at your request.

Hearing Activity

I decided nine land use applications during 2009. Each case is listed on the attached table in chronological order of hearing. Abbreviations are hopefully self-explanatory: "Interp Ap" = Appeal from an administrative code interpretation; "Ad Ap" = Administrative Appeal.

By comparison, I decided five cases in 2008, 17 in 2007, seven in 2006, 16 in 2005, three in 2004, 11 in 2003, and 20 in 2002.

Last year's cases included two preliminary subdivision applications totaling 12 proposed lots, a day care center, a Conditional Use Permit for a car dealership sign, two one-year variance extensions, and three appeals, two of which involved the same hotel proposal.

Discussion of Issues

I discovered during the car dealership sign case that the LMC's provisions regarding maximum allowable sign area are less than crystal clear. One of the standard rules of statutory construction is that the use of different words or terms in a statute evidences a difference in intent. Section 21.16.310 LMC regulates both "total allowable sign area" and sign area per "face." I interpret the former to refer to the maximum allowable area for the sum of all sign faces and the latter to refer to the maximum allowable area of any one sign face. (A two-sided sign has two sign faces. If, in simple terms, a two-sided sign were 5' x 10', each face would contain 50 square feet and the total sign area would be 100 square feet.) If that is not the City's intent, then a code "scrub" to clarify intent would be appropriate.

The *Legacy Hotel* appeals raised the question of "standing to appeal." "Standing" means the legal right to take an action; one who has "standing to appeal" is legally entitled to file an appeal. The LMC has very relaxed standing requirements for appeals to the Hearing Examiner. In a July 16, 2009, Interlocutory Order Denying Motions to Dismiss, I explained the LMC's SEPA standing provisions as follows:

- B. Lynnwood's primary SEPA appeal procedures are contained in LMC 17.02.195. Subsection 17.02.195(A)(1) LMC provides that "Any agency or person may appeal" a SEPA threshold determination. Subsection 17.02.195(A)(1)(a) LMC requires that an appeal be filed within 14 days of the issuance of the threshold determination and further provides that timely appeals are to be handled "pursuant to Process VI, LMC 1.35.600 et seq."
- C. Process VI [LMC 1.35.600 *et seq.*] says nothing at all about standing to appeal.
- D. The word "person" is not defined in Chapter 17.02 LMC (See Definitions at LMC 17.02.220), Chapter 1.35 LMC, or Chapter 197-11 WAC (See Part Eight). The word "person" is defined in Chapter 17.10 LMC, Environmentally Critical Areas: "'Person' means an individual, firm, partnership, association or corporation, governmental agency, or political subdivision." [LMC 17.10.030(P)] The word "person" is used in at least one section of Chapter 17.10 LMC¹: "Any person who objects to the final order of the city under this chapter may file an appeal" [LMC 17.10.120]
- E. It is entirely reasonable and appropriate to apply the Chapter 17.10 LMC definition of the word "person" to that word's usage in Chapter 17.02 LMC, especially since both usages refer to the right to appeal an action and both occur in the same code title. A corporation is considered a person under the LMC and has standing to appeal SEPA threshold determinations.

¹ The Examiner has not looked for other usages.

- F. The LMC establishes no other restriction on standing. “Any person” has standing to appeal a SEPA threshold determination. That phrase is itself a standing provision, albeit a very expansive one. If the City Council wishes to further limit SEPA appeal standing, it may add limiting language to the LMC. Unless and until it does, the existing, clear language must be given effect.

I explained the Project Design Review (PDR) appeal standing provisions as follows in that same Order:

- C. Section 21.25.130 LMC requires issuance of “a notice of an impending [PDR] decision”. [LMC 21.25.130(A)] That notice must include “A statement that only persons who submit written comments to the director or specifically request a copy of the original decision may appeal the director’s decision.” [LMC 21.25.130(A)(8)] “Any party of record may appeal the [PDR] decision of the director” by filing a written appeal within 14 days of the director’s action. That phrase itself is a standing provision, slightly more restrictive than the SEPA standing provision. Such appeals are handled under Process II. [LMC 21.25.185]
- D. Process II (LMC 1.35.200 *et seq.*) says nothing at all about standing to appeal.
- E. The term “party of record” is not defined within Chapter 21.25 LMC. Given the content of LMC 21.25.130(A)(8), the term must necessarily be read to mean “persons who submit written comments to the director or specifically request a copy of the original decision”; any other interpretation would create an internal conflict within Chapter 21.25 LMC. Internal conflicts in code chapters are to be avoided where a reasonable interpretation exists that does not create such a conflict.
- F. Section 21.25.130(A)(7) LMC requires the notice of impending PDR decision to indicate that persons must submit written comments to the director within 14 days of the notice. “The director shall consider all written comments ... received ... prior to the date on which the decision is to be made.” [LMC 21.25.140] The more liberal of those requirements is the second one: Any written comments received prior to the PDR action are to be considered by the City. Any person who submits timely written comments is a party of record.

State law, on the other hand, includes restrictive standing provisions, both as to judicial SEPA appeals and as to judicial appeals under the Land Use Procedures Act (LUPA). It could easily be the case that a person would have standing to appeal an administrative action to the Examiner, but would lack standing to file a judicial appeal of the Examiner’s action. It is up to the City Council to determine whether it wishes to tighten local standing to match judicial standing provisions in state law.

The *Legacy Hotel* appeals also brought to the fore another procedural issue: To whom may one appeal an Examiner decision on a SEPA appeal? Section 1.35.640 LMC states that the right exists for a closed record appeal before the City Council of the Examiner's decision on a Process VI SEPA appeal. However, RCW 43.21C.075(3)(a) and WAC 197-11-680(3)(a)(iv) both allow one and only one administrative SEPA appeal at the local government level. Therefore, LMC 1.35.640 conflicts with state law and rule with respect to administrative SEPA appeals (but not with respect to any other administrative appeals assigned by code to Process VI). A local ordinance cannot conflict with a mandatory state law. Therefore, the Examiner's decision must be final with right of appeal to Superior Court as provided for under RCW 43.21C.075 and WAC 197-11-680. It would be helpful if the Council could address this conflict.

LYNNWOOD
HEARING EXAMINER DECISIONS - 2009

File Number	Applicant Name Project Name	Case Type Acreage No. of Lots	Decision Reconsideration Action	Decision Date Reconsideration Date
2008PLT0001	McCormick Family Trust <i>Joywood Estates</i>	Pre Plt 1.50 6.00	OKw/c	01/20/2009
2008PLT0002	The McNaughton Group <i>Johnson Addition</i>	Pre Plt 1.54 6.00	OKw/c	01/20/2009
2008CUP0007	Lynnwood Free Methodist Church <i>Day Care Center</i>	CUP 3.16	OKw/c	02/18/2009
2009MAI0001	General Stor-AGE	Interp Ap	Deny	03/13/2009
2009CUP0001	University Volkswagen-Audi	CUP	OKw/c	03/30/2009
2006VAR0002	Kevin Gillen	Var Ext	OKw/c	07/10/2009
2006VAR0001	Kevin Gillen	Var Ext	OKw/c	07/10/2009
2008ERC0031	360 Degree and Innkeepers USA <i>Legacy Hotel</i>	SEPA Ap 3.30	Deny	10/01/2009
2008PDR0015	360 group and Innkeepers USA <i>Legacy Hotel</i>	Ad Ap 3.30	Deny	10/01/2009